IN THE MATTER OF		
	:	BEFORE THE
MARSHALEE WOODS LIMITED PARTNERSHIP	:	HOWARD COUNTY
Appellant	:	BOARD OF APPEALS
vs.	:	HEARING EXAMINER
DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND	:	BA Case No. 643-D
Appellee		

DECISION AND ORDER

On September 15, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the appeal of Marshalee Woods Limited Partnership (the "Appellant" or "MLW"). The Appellant is appealing the Department of Planning and Zoning's ("DPZ") letter of June 18, 2008, notifying it that SDP 08-049 does not conform to the objectives of the Subdivision and Land Development Regulations.

The appeal is filed pursuant to Section 100.F.3 of the Howard County Zoning Regulations (the "Regulations").

The Appellant certified notice of the hearing was advertised and that adjoining property owners were notified as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sang Oh, Esquire, represented the Appellant. Paul Johnson, Deputy County Solicitor, represented the Department of Planning and Zoning. Frank Frederico and Bruce Burden testified on behalf of the Appellant. Cindy Hamilton testified on behalf of DPZ. Mary Roy, a non-adjoining

property owner, was permitted to comment on the case.

The Appellant is appealing certain comments made by DPZ's Division of Land Development ("DLD") concerning acreages and density in Comments 19 and 20, which were attached to Cindy Hamilton's letter of June 19, 2008 to Nick Liparini, Marshalee Wood Ltd. Partnership. The letter concerns SDP 08-049, a site development plan for an Age-restricted Adult Housing ("ARAH") development approved as a conditional use in Board of Appeals Decision and Order BA 06-029C. The comments instruct the Appellant to revise the plan acreages and unit density consistent with F-08-077 to reflect a permitted unit density of 33 units.[1]

The petition's supplemental statement contends DLD's density and acreage comments are legally incorrect. The Appellant ultimately claims DLD seeks to remove the road acreage from the density calculation for the ARAH development because DLD thinks the resultant subdivision would be overdeveloped.

I.
Preliminary Matters

As a preliminary matter, the Appellant stated it would not argue Development Engineering Division General Comment No. 6 and Traffic Engineering Comment No. 3(b) at the hearing.

II.
Exhibits

The following exhibits were admitted as part of the official record.

A. Appellant Exhibits

[1] The density of an ARAH development is initially set when an applicant submits a conditional use petition to the Hearing Examiner. The maximum permitted density for an ARAH development on land split-zoned R-12 and R-20 is controlled by Section 131.N.1 of the Zoning Regulations, which require a minimum of 20 units. Section 130.N.1.a(3) establishes maximum densities. In the R-20 zone, the maximum density is 4 units per net acre for a development of 20-49 total units and 5 for those with 50 or more units. In the R-12 zones, the maximum density is 5 units per net acre for a development of 20-49 total units and 6 for those with 50 or more units. Section 130.N.1 also imposes site design, open space, structure and use setbacks, unit length restrictions and other requirements on the use is computed.

1. Administrative Adjustment Plan Map dated August 2008 with pertinent acreages outlined in green

2. Second Amendment Developer Agreement, dated January 27, 2008

3. DPZ Technical Staff Report ("TSR") for Marshalee Woods Limited Partnership, Conditional Use for Age- restricted Adult Housing with 52 dwelling units, dated October 6, 2008

4. Graphic Comparison of Zoning/Resubdivision Scenarios, Prepared by Sang Oh during Hearing

B. Appellee Exhibits

1. Recorded Plats. Top sheet -- Plat M.D.R. No. 17089 for Marshalee Woods, stamped December 3, 2004. Second sheet – Plat M.D.R. No. 17093. Third sheet – Plat M.D.R. No. 17090.

2. Second Marshalee Drive Agreement, dated August 30, 2006

3. Internal Memorandum, Subject: Marshalee Drive, from Mike Antol, DPZ to Karen Stires, Real estate Services Division, dated July 25, 2008

III.
Background

Marshalee Drive (the "Road)" is, in pertinent part, a planned, minor arterial public road designed to connect Montgomery Road to multiple subdivisions to the south. MLW is the developer of Marshalee Woods, which was originally planned and substantially developed comprehensively in two sections and several areas as multiple single-family detached subdivisions on land zoned R-20. The planned road would cut a wide swath through Marshalee Woods.

Because the road's ultimate alignment had yet to be determined when MLW or its parent company, Brantly Development Group,[2] sought to develop its properties, the County allowed MLW to construct a temporary road while requiring it to reserve a 150-foot right-of-way for the public portion of Marshalee Woods and its tie-in with Montgomery Road, in accordance with the Subdivision and Land Development Regulations (the "Subdivision Regulations") Once the alignment was determined, the remaining portion of the reservation would become open space.

In the second Marshalee Drive Developer Agreement, MLW agreed to design and construct Phase IIIa and the County agreed to design and construct Phase IIIb, the upper section where it would connect with Montgomery Road. In the original 1996 agreement, the road's completion date was May 2001, but in 2006 MLW requested, and the County agreed, that the completion date for the public and private improvements would be extended to May 2006.

The County set the ultimate ROW for Marshalee Drive.[3] In 2004, Brantly Development Group recorded three plats for Section 2, Area 5, for buildable lots 150, 151, and 152.[4] The recorded plats, a resubdivision, stated the re-recordation is "to re-record previously recorded Open Space Lots 85, 86, 87 & 125, to define the ultimate right-of-way per Capital Project J4136, reconfigure previously recorded residential Lots 127 and 129 to new Lots 150-152 and Non-Buildable Parcel "A" and to rename a portion of Marshalee Drive to Saw Grass Court." An arrow on Sheet 2, identified as Plat M.D.R. No. 17093, points to Marshalee Drive and states it is "[l]and dedicated to Howard County Maryland for purposes of a public road: 1.2032 Ac. +/ (this sheet)."

Subsequent to its recordation of these plats, MLW (or Brantly Development Group) acquired additional acreage to the north, several parcels or lots fronting on Montgomery Road.[5] The County had rezoned this area to R-20 during the 2004 Comprehensive Zoning Plan.[6] In 2006, MLW petitioned the Hearing Examiner for conditional use approval to construct 52 Age-restricted Adult Housing dwelling units on the combined acreage of the 2004 record plat/s, the newly acquired acreage, and additional lands for a site comprising 11.4 acres. The TSR (Appellant's Exhibit 3) noted as follows.

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[2] Also spelled "Brantley" in several exhibits.
[3] The record does not establish the date.
[4] See Appellee Exhibit 1.
[5] These lots are shown on the TSR site map, page 1. Appellant's Exhibit 1.
[6] DPZ Exhibit 1, F 04-95, Sheet 1, General Notes # 4.

> The Site is made up of many different properties, some of which had originally been intended as building lots and open space for the Marshalee Woods subdivision. Parcel 320 and Lots 13, 14, and 15 of Parcel 354 were not part of Marshalee Woods and are single-family detached residential lots fronting on Montgomery Road.

Attached to the TSR are four comments from DLD dated September 16, 2006. Comment 1 states as follows.

> Much of the acreage included within the boundaries of this submission has been previously platted. The exhibit provided with the application does not accurately reflect the existence of these platted properties, some of which were designated for dedication to the County at the time they were platted (i.e. Open Space Lots 153 and 149 as shown on plat #17093). The developer must document his ownership of these lots before their acreage can be counted toward the project density.

The Hearing Examiner approved the conditional use petition.[7]

SDP 08-049, the site development plan for Marshalee Woods, Parcel A, proposed ARAH, Parcel A-1, does not utilize the Open Space lot acreages for density, and proposes 43 ARAH units on the reduced acreage. This acreage is outlined in green on Appellant's Exhibit 1, which depicts (1) the original subdivision boundary of Marshalee Woods, a 1.0099-acre section (now zoned R-20) and a 3.1821-acre section zoned R-12; (2) a 3.3596-acre section comprising the later acquired lots/parcels along Montgomery Road, and (3) a 3.1630-acre area comprising the Marshalee Drive ROW.[8]

The contested DLD comments concern the third land area, the ROW acreage shown as dedicated to Howard County on a record plat/s and F 08-077. Cindy Hamilton's letter of June 19, 2008 to Nick Liparini, Marshalee Wood Ltd. Partnership includes two DLD comments to MLW

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[7] Because the Decision and Order for BA 06-029C was not introduced into evidence, I do not know whether the Hearing Examiner approved the requested 52 units or considered (1) the TSR's comments about the inclusion of acreage originally intended as building lots and open space for the Marshalee Woods Subdivision (page 4) or (2) DLD's attached comments concerning the ownership of certain lots in order to count their acreages toward project density.

[8] I note for the record that the ROW acreages noted in the Exhibits vary for reasons unknown.

following its review of the May 9, 2008, second revised submission of SDP 08-049. They state as follows.

> 19. Acreages and unit density:
> A. Revise the acreages in General Notes 6 and 7 per the most current information on F-08-077.
> B. Revise the unit density information and related information in General Notes 7 and 11 per the acreages on the most current copy of F-08-077.
>
> 20. Revise the plans and all related information per the reduced, permitted unit density of 33 units.

F-08-077, the final plan for the ARAH development, which DLD found to be technically complete, does not include the ROW acreage. This plan also shows the ROW acreage as dedicated to the County.

Neither the Zoning Regulations nor the Subdivision Regulations make specific reference to a property owner's ability or right to utilize a road or ROW dedication shown on a record plat/s (or technically complete plan) in the calculation of density when the property owner later acquires additional lands and puts density on everything, including the dedication acreage.

Consequently, in considering whether the Appellant has demonstrated that DPZ's density comments are arbitrary or capricious, or otherwise contrary to law, I am obliged to consider the role of DPZ in the Hearing Examiner age-restricted adult housing conditional use petition process and the processing and approval of subdivision plans, specifically a site development plan[9] and a final subdivision plan.[10] I must also consider the Appellant's argument that land is not dedicated until deeded to the County against the case law addressing common law dedication and statutory

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[9] The Subdivision Regulations define a "Site development plan" as "[a] plan prepared in accordance with the Subdivision and Land Development Regulations indicating the location of existing and proposed structures, paved areas, trails, walkways, vegetative cover, existing and proposed grades, initial landscaping, screening and other required items within a site proposed for development. Section 16.108(b)(52).

[10] The Subdivision Regulations define a "Final subdivision plan" as "[a] final plat and supporting detailed plans and data

dedication, which occurs upon recordation of a subdivision plat.

IV.
Standard of Review

Rule 10.2(c) of the Hearing Examiner Rules of Procedure sets out the burden and standard of proof in the appeal of an administrative agency decision.

> In any other appeal of an administrative agency decision, the petitioner must show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

V.
Discussion and Analysis

A. DLD's TSR and SDP 08-049 Comments

As a starting point, an administrative agency's interpretation and application of a statute that the agency administers should ordinarily be given considerable weight. Furthermore, the expertise of the agency in its own field should be respected. *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 69 (1999) (internal citations omitted).

An important aspect of the Appellant's challenge to DLD's acreage and density comments is the responsibilities of two DPZ divisions, Public Service and Zoning Administration ("Zoning") and Land Development. Pursuant to Section 130.4 of the Zoning Regulations, Zoning evaluates conditional use petitions for hearings before the Hearing Examiner. Land Development administers the development plan review process pursuant to Section 16.103 of the Subdivision Regulations, which charges DPZ with the responsibility for the final approval or disapproval of proposed subdivisions and site developments. DLD chief Cindy Hamilton "chairs" the Subdivision Review Committee ("SRC"), an interagency review group organized to coordinate the subdivision and site development plan review process. Subdivision Regulations, Section 16.144.

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demonstrating that all technical requirements of the County's regulations have been met." Section 16.108(b)(21).

MLW first points to the DLD comment attached to the TSR for BA 06-029C in support of its argument that DLD acted arbitrarily and capriciously in requiring the dedicated ROW acreage to be excluded from the density calculation for the ARAH development. It interprets this comment as DLD's implicit recognition that MLW could figure the ROW or road acreage into density because the comment references only certain dedicated Open Space Lots as examples of platted properties whose acreages may not be used in calculating density.

Cindy Hamilton testified that DLD comments on a proposed conditional use are preliminary and limited, conditional use reviews being Zoning's province. She explained that DLD recently began to provide preliminary comments to Zoning when it evaluates petitions for religious and ARAH uses because these projects frequently come to the SRC with major problems.[11]

In my view, MLW reads too much into the DLD TSR comment. As Cindy Hamilton testified, the comments DLD makes to Zoning for inclusion in a TSR are limited in scope. They are preliminary alerts to Zoning, the Petitioner, and the Hearing Examiner, not final words. Moreover, DLD's TSR comment is written in general language; it refers to "some" properties designated for dedication, not just Open Space lots. Certainly, "some properties" could encompass dedicated ROWS or roads.

Cindy Hamilton further testified it is DLD's practice or policy to cease recognizing a ROW shown as the developer's land once it is dedicated on a recorded plat. In support of this position, she noted that the same ROW dedication is shown on consolidated plat F-08-077, for which DLD issued a technically complete letter and which does not utilize the ROW acreage. She contrasted this

[11] This is echoed in the copy of a March 18, 2008 email attached to the appeal petition. The email from Cindy Hamilton to various persons summarizes a discussion between her and Tom Carbo, the former Hearing Examiner. Issue No. 3 states that DLD is not currently in the review loop for CUs and variances. "We don't want DLD to be involved, but we also don't want significant problems to be encountered late in the plan process (when it gets to the SRC). Harold has volunteered to sit in on pre-submission meetings in Zoning to help interject issues which are of relevance to our review."

position with DLD's recognition that *all the area* shown in a sketch plan that relies on phasing can be used to calculate density, which would be locked in. Based on her administration of the Subdivision Regulations, the only way MLW could have included the ROW dedication in its density calculation would be to vacate any plats showing the dedication and submit a wholly new subdivision plan, which did not occur.

Because DLD is responsible for applying Subdivision Regulations policy, it has special expertise to adopt policy for regulations it administers and enforces when these regulations are silent on a specific issue. DLD has interpreted the Subdivision Regulations to exclude the acreage of public rights-of-way from ARAH density calculations when that land is shown as dedicated on a record plat.

Moreover, DLD's determination is logical, being consistent with other statutory subdivision provisions. The Subdivision Regulations define "Dedication" as "[t]he *offering* for conveyance of land or public improvements for any general and public uses, *reserving to the owner no other rights* than those of the general public" (emphasis added). In addition, a "public street" is "[o]pen to common use, *whether or not public ownership is involved.*" Section 16.119(g)(3), proscribes owners seeking to subdivide their land from using rights-of-way reservations in the calculation of the residential density allowed by zoning, open space, and forest requirements, but allows an additional ROW voluntarily dedicated to the County or State to be used when calculating residential density and open space dedications. Thus, when a final plat[12] denotes land as dedicated for a public road or ROW, the owner no longer enjoys the right to use the acreage for density utilization.

[12] The Subdivision Regulations define a "final plat" as "[t]he official record of a division of land approved by the Department of Planning and Zoning and recorded in the land records of Howard County."

MLW has not met its burden here of showing that DLD's TSR comment controls or that its June 18, 2008, SDP 08-049 density/acreage comments are arbitrary or capricious. DLD is to be accorded deference to its policy or position that the acreage of a dedicated ROW depicted on a recorded plat is figured out of, not into, the computation of density of the ARAH development being processed as SDP 08-049. It is consistent with the spirit and intent of the Subdivision Regulations.

B. Common Law Dedications and Statutory Dedications

The keystone of MLW's appeal is its claimed right to utilize the ROW or road acreage in computing the ARAH density because this acreage has yet to be dedicated. MLW avers it has offered to dedicate the contested acreage, but the Howard County Department of Public Works has not made a corresponding acceptance of the land through the recordation of a deed in the Howard County Land Records.

Although MLW does not ground this claim on any case law or regulation, Section 16.119(g)(2)(iii). Highways, Streets, and Roads appears at first blush to lend support to this assertion because it requires a ROW to be both "dedicated *and* deeded to the County or State with the final plat, when direct driveway access is provided to the proposed subdivision." (Emphasis added.) Nevertheless, as the Maryland Courts have made clear, when a statute requires a ROW or road dedication to be shown on a plat, the sole act of recording of that plat constitutes statutory dedication, the recordation itself memorializing the owner's offer to dedicate *and* official acceptance of the public use area. *Whittington v. Good Shepherd Evangelical Lutheran Church of Palmer Park*, 236 Md. 185, 202 A.2d 751 (1964), holding that under the statute and the evidence the dedication to public use was accomplished through the recordation of the plat at issue and was then complete without more; *Maryland-National Capital Park and Planning Commission v. McCaw*, 246 Md. 662, 673, 229 A.2d 584, 589 (1967), decided on other grounds, stating in *McCaw* that under the statute,

the dedication to the public is complete and the interest of the public has vested when the approved subdivision plat is filed; *Town of Glenarden v. Lewis*, 261 Md. 1, 4-5, 273 A.2d 140, 142-3 (1971) (a dedication may occur by express statutory provision or other similar official action, the term dedication including both the offer and the acceptance). Approving and following *Whittington,* the Court in *Mayor and Council of Rockville v. Geeraert*, 261 Md. 709, 715 276 A.2d 642, 645 (1971) read the applicable county code provision to conclude a dedication of land is accepted when the subdivision plan is recorded with official approval. The Court of Appeals more recently commented on subdivision statutory dedications and common law dedications in *City of Annapolis v. Mareen Waterman*, 357 Md. 484, 745 A.2d 1000 (2000), describing them as "different creatures."[13] The *Waterman* decision reviewed several examples of cases in which the courts found statutory dedications in subdivision regulations that imposed a dedication or fee requirement (a fee in lieu of) at the time of final platting. *Id.* at 503-05, 1010-12.

In the instant case, the definition of "dedication," as discussed above, is a declaration that land offered for *public or general use* reserves to the owner no other rights than those of the general public. Section 147(c)(21), concerning information to be included on a plat, requires individual or corporate property owners to *grant* unto Howard County the right to require dedication for public use the beds of the streets ... *and* for good and other valuable consideration, [to] grant the right and option to Howard County to acquire the fee simple title to the beds of the streets and/or roads ... (Emphasis added.) Additionally, Section 16.147(b)(9) requires DPZ to record the final plat in the land records and notice the developer by mail of the date of recording and the plat number.

[13] I note that a common-law dedication, unlike a more formal statutory dedication, does not pass fee simple; rather, it passes an easement to use the property in a manner consistent with the dedication. See, e.g., *Chester v. Gilchrist*, 497 A.2d 820 (Md. 1985), rev'd on other grounds, 514 A.2d 483 (1986).

By this statutory scheme, the dedication of a ROW or road is a complete grant for public use--without more--when Howard County records a final plat. The dedication does not require deeding (public ownership) to be effective. In this case, the record plats in Appellee's Exhibit 1 designate the contested ROW or road acreage as land "dedicated to Howard County for purposes of a public road." Their recordation is an acceptance of MLW's offer to dedicate the ROW or road acreage.

Elsewhere, the Howard County Code contemplates that dedications of land and the conveyance of title to that land are parallel and independent actions. Section 18.201 of the Howard County Code establishes a procedure by which the Department of Public Works acquires title to roads, rights-of-ways and associated public improvements "for which an option to acquire for public purposes has already been *granted* to Howard County, Maryland, *in consideration for approval of a subdivision plan*." (Emphasis added.) In other words, the recordation of a final subdivision plan showing a dedication constitutes an offer and acceptance of a ROW or road, without more, including the option of deeding the land area to the County.

In light of the law of statutory dedications and the evidence, it is of no import that the County has chosen not to strictly enforce the amended agreement and compel MLW "to convey all its right title and interest in the bed of the road"[14] with the record because of delays in completing the improvements, as Cindy Hamilton testified.

Conclusion

During the delay in setting the ultimate right-of-way for Marshalee Drive, MLW revised its plan for an ARAH development after acquiring new acreage. DLD, pursuant to its authority under Section 16.101(a)(6) to determine the ARAH development's density in conjunction with the Zoning Map and Regulations, chose to exercise its expertise and instruct MLW to revise the density and

acreage figures on SDP 08-049 to comport with a record plat and the technically complete F-08-077. DPZ, through DLD, determined the developer should not be permitted to use the acreage at issue to achieve a higher density than contemplated by the zoning map and regulations, where the developer had already dedicated that acreage via the recordation of a final plat or plan.

The Appellant has not demonstrated by substantial evidence that the action taken by DPZ, through DLD, was clearly erroneous, arbitrary and capricious, or contrary to law based on either DLD's TSR comment or because MLW has yet to deed the contested acreage to the County. To the contrary, this examination of dedication case law, the County Code, and evidence corroborates that DLD's comments are consonant with the Subdivision Regulations.

[14] This language appears in the Second Marshalee Drive Agreement (Appellee's Exhibit 2).

ORDER

Based upon the foregoing, it is this **6th Day of October 2008** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Marshalee Woods Limited Partnership is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

Michele L. LeFaivre

Date Mailed: 10/7/08

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.